IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 34 OF 2005

Smt.Hansbai Mandeo Shinde & ors. ... Appellants.
Versus.
The Municipal Corporation of
Greater Mumbai,. ... Respondents.

Shri Shripad Murthy with Shri Vipin Mishra Appellants.

Shri N.V.Walavalkar with Ms.Geeta Joglekar for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 4th March, 2005.

P.C.:

1. Heard Shri Murthy for the Appellants and Shri Walawalkar for the Respondents.

2. This Appeal was repeatedly argued before me by different Counsels appearing for the Appellants on different dates. On 21st February 2005 I passed the following order:

(1) Place the Appeal for orders on 28th February 2005, first on board. Till that date the status-quo as of today will be maintained.

(2) The learned Counsel appearing for the Appellants states that on Monday i.e. 28th February 2005, he will file undertaking of

all the adult members of the Appellant's family stating therein that they will vacate the suit premises and hand over vacant possession thereof to the Respondent-Corporation within the time granted by the Court and they will unconditionally withdraw the suit filed in the City Civil Court. He further states that copies of the said undertakings will be furnished to the Advocate for the Respondents within two days from today.

When the Appeal was called out on 1st March 2005, the Advocate appearing for the Appellants stated that it was not possible for the Appellants to give undertaking. Today Shri Murthy appeared and has made some submissions on merit. It is to be noted here that on more than three dates fixed earlier the Appeal from Order was argued and only because the premises in dispute are residential premises, from time to time I went on adjourning the matter. As the Appellants have not filed the undertaking as per the statement of their Advocate as recorded in the order dated 21st February 2005, I have considered the merits of the appeal.

3. The building in dispute is a building consisting of residential tenaments. The case of the Appellants/

Plaintiffs is that they were in possession of the old structures situated on the property in dispute and Shri Manik Reddy, a builder approached them and on representation of the said builder, they vacated their respective structures and entered into agreements with the builder under which the builder agreed to provide permanent accommodation to them in the newly constructed building.

4. The suit has been filed by the Appellants in the trial Court for declaration that the notice dated 8th March 1999 issued under section 351 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as the said Act of 1888) and the Notice dated 18th November 1999 issued under section 488 of the said Act of 1888 are bad-in-law. By the impugned order, the Notice of Motion taken out by the Appellant for temporary injunction has been rejected by the trial Court.

5. It is not in dispute that the Notice under section 351 of the sad Act of 1888 was issued on 8th March 1999. The notice was replied by the Builder Shri Reddy. Prior to that the Respondent-Corporation issued a notice under section 354A of the said Act of 1888 to the Builder. Inspite of service of the said stop work notice, the builder continued with the work of construction. The

builder also filed a suit for challenging the notice under section 351. In the said suit filed by the Builder, the learned trial Judge passed an order directing the Deputy Municipal Commissioner of Respondent No.1-Corporation to give fresh hearing and to pass appropriate order. Accordingly final order of demolition has been passed on 19th July 1999. The application for regularisation made by the builder has been admittedly rejected.

6. Copies of the agreements entered into in favour of the Appellants are annexed to the plaint. Neither the recitals in the said agreement nor the averments in the plaint show that before entering into the agreements the Appellants made enquiries to ascertain whether any permission was granted by the Respondent-Corporation for construction of the building. Even at the time of entering possession of the respective tenements the Appellants have not verified whether the construction was authorised.

7. The position as it stands today is that construction of the entire building consisting of ground and three upper floors is completely unauthorised. Due process of law under section 351 of the said Act of 1888 has been completed in the year 1999 and the application made for regularisation by the builder is already rejected.

8. The only submission which is made today is that some sympathy deserves to be shown to the Appellants who are occupying the residential premises. If the building consisting of ground plus three upper floors is constructed without any permission whatseover and if the application for regularisation of the said building is rejected, the structure cannot be protected at all. If the structure is illegal it has to be demolished unless it is protected by any of the policies of the Municipal Corporation or of the State Government.

9. In this view of the matter, no primafacie case is made out. There is no error in the impugned order. Hence the Appeal is dismissesd with no order as to costs.

10. Shri Murthy at this stage submitted that in the event the building in dispute is demolished, the builder or any person claiming through the builder may apply for permission to construct a new building and after obtaining permission he may construct new building and will sell the flats and earn huge profits. Looking to the allegations which are made in the plaint, there is some substance in the said submission made by Shri Murthy. The case of the Appellants is that they were in possession of the old structures situated on the land

and after demolition of the old structure the present new building is constructed by the builder. Therefore, it is necessary that if any proposal or Application for construction of a new building is submitted by the builder or any person, the Respondent-Corporation should not process the application without the Applicant giving intimation of the proposal to the present Appellants.

11. At this stage Shri Murthy the learned Counsel for the Appellants states that ad-interim order passed by this Court on 11th January 2005 and extended from time to time thereafter be extended for a reasonable time. He submits that the Appellants be permitted to apply for regularisation. The said request is opposed by the learned Counsel for the Respondents.

12. Considering the fact that the suit premises are residential premises and it will take sometime to obtain copy of this order, the ad-interim order passed on 11th January 2005 will continue to operate till 31st May 2005. The request made for grant of liberty to apply for regularisation cannot be acceded to. The Appellants can apply for regularisation provided law permits them to do so.

13. If after the demolition of the building any application for grant of permission for construction of

a new building on the suit site is received by the Respondent No.1-Corporation from any person, the said application shall not be processed by the Respondent No.1-Corporation unless intimation in writing is given by the Applicant to the present Appellants.

12. The parties to act on authenticated copy of this order.

Judge.